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In the Supreme Court of the United States

OCTOBER TERM, 1983

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.,
PETITIONERS

v.

STATE OF CALIFORNIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

In our opening brief, we demonstrated that Section 307(c)(1) of the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. 1456(c)(1), does not impose consistency limitations on OCS lease sales based upon the hypothetical effects of possible exploration, development and production activities.[1] We showed that, by limiting the application of Section 307(c)(1) to activities "directly affecting the coastal zone," Congress plainly provided that only those federal activities that have some immediate, identifiable impact on the coastal zone would trigger the substantive consistency

[1] The following abbreviations will be used in this brief. State Br. refers to the Brief for the State of California as respondent in Nos. 82-1326 and 82-1327. Humb. Br. refers to the Brief for the Respondents Humboldt County, et al. in Nos. 82-1326 and 82-1327. NRDC Br. refers to the Brief for the Respondents Natural Resources Defense Council, et al. in Nos. 82-1326 and 82-1327. CSO Br. refers to the amicus curiae brief filed by the Coastal States Organization. Alaska Br. and New Jersey Br. refer to the briefs submitted, amicus curiae, by those states.

requirements of the CZMA (82-1326 Pet. Br. 20-27).[2] We further established that Congress has carefully integrated the provisions of the CZMA with the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. (& Supp. V) 1331 *et seq.*, and has specifically rejected the imposition of consistency limitations at the lease sale stage of the OCS process based upon the potential effects of future exploration, development and production activities (82-1326 Pet. Br. 27-35). Finally, we showed that the underlying purpose of the consistency requirements of the CZMA cannot be served by imposing consistency limitations at the lease sale stage because available information is insufficient to determine, in a meaningful way, whether future exploration, development and production activities will, in fact, be consistent with a state's coastal zone management program (82-1326 Pet. Br. 41-49).

The numerous respondents and amici have raised two principal objections to the government's submission. First, they argue that it is only "logical" to assume that Congress imposed a consistency limitation at the lease sale stage of the OCS process (CSO Br. 14, 27-28; NRDC Br. 48; see also Humb. Br. 13), and conclude that, since Congress explicitly rejected such a requirement under the provisions of Section 307(c)(3), the consistency requirement must be located in Section 307(c)(1). Second, they assert that certain policy goals would be furthered by consistency "review" of OCS lease sales, even though the underlying substantive goals of the CZMA admittedly cannot be fulfilled at this stage of the OCS process (CSO Br. 18; State Br. 40-41).

Contrary to the apparent thrust of respondents' arguments, however, the federal government is not obliged to produce explicit congressional language expressly "ruling out" the consistency requirement sought by respondents. Rather, the issue is whether the statutory language chosen

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[2] The State claims that the definition of "direct effects" proferred by the federal petitioners does not constitute the "plain meaning" of Section 307(c)(1) because it limits the application of the statute to physical effects (State Br. 22). What the State ignores is that Congress defined the coastal zone in physical terms, not in economic, sociological or psychological terms. See 16 U.S.C. 1453(1).

by Congress in 1972 and 1976, as explained by its contemporaneous legislative history, can fairly be interpreted as creating such a requirement. Nor should respondents' optimistic descriptions of the benefits to be derived from this proposed consistency "review" of all OCS lease sales—*i.e.*, intergovernmental coordination, information sharing, and comprehensive planning—divert this Court from focusing upon what is ultimately at stake in this litigation.

Despite respondents' repeated appeals to notions of wise procedure, they do not, and could not, take issue with the fact that the CZMA is not another procedural, decision-informing requirement. It is, instead, a substantive limitation on federal activity, and the procedural benefits postulated by the respondents and the amici are largely duplicative of the provisions of NEPA and the OCSLA. In the OCS lease sale context, moreover, there is no readily discernible means of determining when a proposed sale is, in fact, consistent "to the maximum extent practicable" with a state coastal management plan: applicable NOAA regulations provide no real guidance (82-1511 Fed. Cr. Res. Br. 19), the Ninth Circuit opinion recommends case-by-case determination (Pet. App. 22) and the respondents are unwilling even to discuss what standard would be both possible and meaningful (82-1511 Cr. Pet. Br. 22-27).

The decision of the court below unquestionably portends decades of case-by-case litigation to determine whether all the possible on-shore effects of each and every proposed OCS lease sale are consistent "to the maximum extent practicable" with approved state management plans. Such a result will drain both state and federal resources without, in the end, substantially furthering the underlying goal of Section 307(c)(1) of the CZMA—consistency. In these circumstances, the Court should return Section 307(c)(1) to its proper role by restoring the term "directly" to the statute, and placing the states' substantive authority to restrict OCS development where Congress intended: those stages where there is in fact available information on the basis of which meaningful decisions can be made.

I

In examining the legislative history relevant to this case, several considerations must be kept in mind. Initially, the

precise question presented here is not whether OCS oil and gas operations have general significance for the coastal zone. They do. Congress clearly made that determination in 1976 when it enacted Section 307(c)(3)(B), 16 U.S.C. 1456(c)(3)(B), which applies CZMA consistency requirement to the specific stages of the OCS oil and gas process.[3] Nor does this case concern whether Section 307(c)(1) of the CZMA "applies" to the pre-leasing activities of the Department of the Interior. It does. The federal government has repeatedly stated, throughout this litigation, that Section 307(c)(1) applies to the actions of the federal government performed in conjunction with a lease sale and to any actions by potential lessees that are immediately authorized by the issuance of the lease without a requirement for further federal approval. If any of these actions "directly affect" the coastal zone, a consistency determination will be prepared on those activities.[4] Finally, both the CZMA and the 1978 amendments to the OCSLA were controversial statutes that were debated in several sessions of Congress

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[3] Respondents' references to the portions of the CZMA that address the statute's application to "energy facilities" (CSO Br. 23; Humb. Br. 9) do not advance their case. The CZMA defines energy facilities as "equipment [facilities] used in exploration, development, production and transportation" of hydrocarbon resources. 16 U.S.C. 1453(6). Indeed, the statute defines "OCS energy activity" as "exploration, development and production" activity or "siting, construction, expansion or operation" of energy facilities. 16 U.S.C. 1453(13). Neither term refers to leasing, a pointed omission.

[4] If such activities are not found to "directly affect" the coastal zone, a negative determination is prepared pursuant to NOAA regulations. This procedure was followed in connection with OCS Lease Sale No. 53 (J.A. 66-72). As a practical matter, the activities of the federal government in preparing and conducting a lease sale, *i.e.*, information gathering and preparation of an environmental impact statement, do not normally have a direct effect on the coastal zone. Moreover, as we stated in our opening brief, the "preliminary" activities in which lessees may engage prior to approval of an exploration plan also generally have no physical effect on the coastal zone (82-1326 Pet. Br. 7). Respondents did not claim below and the lower courts did not rule that any of these activities "directly affected" the coastal zone. Amicus curiae Coastal States Organization's discussion of preliminary seismic testing (CSO Br. 15 n.8), therefore, is irrelevant to the issue properly before this Court.

before enactment. In the course of the legislative proceedings, suggestions were made and report language was drafted that represented positions ultimately rejected by Congress as a whole. For this reason, all legislative history must be read in the context of the terms of the final bills passed by Congress.

1. Perhaps the most egregious example of reading the legislative history of the CZMA out of context is the universal reliance of the respondents (State Br. 12, 15; Humb. Br. 25-26; NRDC Br. 25; CSO Br. 12) on a paragraph in a 1971 Senate Report which suggests that certain areas of the OCS that bear a "functional relationship" with the coastal zone "should be" managed in conformity with an adjacent state's approved coastal zone management program. This passage, the respondents' argue, reflects the meaning Congress intended when it adopted the term "directly affecting" the coastal zone a year later. While it is understandable that respondents rely on this paragraph, since it is the only reasonably contemporaneous legislative history that even remotely supports their position, this paragraph actually reflects a suggestion that was explicitly rejected by the Conference Committee in 1972.

The 1971 Senate Report, S. Rep. 92-526, 92d Cong., 1st Sess. 20 (1971), recognized that the pending definition of the coastal zone, which extended only to the outer limits of the three-mile territorial sea—where the coastal State owns the submerged lands and their resources—"would not support planning and implementation of a management program" in special areas of the OCS (such as channels or embayments) that have a functional interrelationship with the surrounding coastal zone because the CZMA, as then drafted, imposed consistency requirements only upon federal activities "in" the coastal zone. Nevertheless, the report suggested that these special areas of the OCS "should be" administered consistently with the state coastal management program. *Ibid.* Despite respondents' and the amici's evident enthusiasm over this passage, it is not as illuminating as it appears at first blush. In discussing the functional interrelationship of the coastal zone with the OCS, the Senate was concerned with specific, unusual

areas of the OCS that have special significance to state coastal waters; it was not concerned with federal activities on the OCS as a whole. And, even more importantly, the Senate bill to which this report was addressed contained no provision implementing the suggestion that functionally interrelated areas of the OCS should be administered consistently with an adjacent state's coastal zone management program. See S. Rep. 92-526, *supra*, at 3, 7, 30. At most, the report language reflects an idea held by the Senate Committee in 1971 that it was not willing to transform into binding law.

The bill passed by the House in 1972, however, did contain provisions that required the government to administer certain areas of the OCS consistently with approved coastal zone management programs. Section 313 of the House Bill, H.R. 14146, 94th Cong., 2d Sess. (1972); H.R. Rep. 92-1049, 94th Cong., 2d Sess. 7 (1972), directed the Secretary of Commerce to develop a management program for the OCS. The House Report states that, under this program "the Secretary shall, to the maximum extent practicable, apply the coastal zone program to waters immediately adjacent to the coastal waters of a State * * *." *Id.* at 23. At conference, this House provision was deleted from the bill because it would "create potential conflicts with legislation already in existence concerning Continental Shelf resources." H.R. Rep. 92-1544, 92d Cong., 2d Sess. 16 (1972).

The thrust of respondents' arguments, therefore, is that, by creating the term "directly affecting the coastal zone," the Conference Committee in 1972 intended, sub silentio, to implement the suggestion contained in the 1971 Senate Report concerning special areas of the OCS at the same time that it was explicitly rejecting a House provision that effectuated the sentiments expressed in that report. Such a submission is absurd. As stated in our opening brief (82-1326 Pet. Br. 23-24), the Conference Committee drafted the term "directly affecting the coastal zone" as part of a compromise between the Senate and House versions of the CZMA, which conflicted regarding the consistency obligations of the federal government for activities undertaken on

federal lands within the confines of the coastal zone.[5] Thus, the "directly affecting" language of Section 307(c)(1) was not drafted to expand the consistency obligations of the federal government, but rather was intended to limit the parameters of the Conference Committee's eventual compromise. 82-1326 Pet. Br. 23-24. Respondents' contrary conclusion does not arise out of any analysis of the legislative process that resulted in Section 307(c)(1), but instead rests on the bare fact that the 1971 Senate Report exists and the Conference Committee thereafter coined the "directly affecting" threshold.[6]

2. Respondents' quotations from committee reports prepared in 1975 and 1976 that support the application of consistency requirements to OCS leasing must also be read in context (State Br. 27; NRDC Br. 20-30). After all, until conference, the legislative proposal in 1976 was to amend Section 307(c)(3) to include the terms "lease" and "leasing" for the precise purpose of subjecting the issuance of OCS leases to CZMA consistency requirements. Not surprisingly, therefore, the committee reports contain language detailing the advantages of that approach. S. Rep. 94-277, 94th Cong., 1st Sess. 19-20 (1975); H.R. Rep. 94-878, 94th Cong., 2d Sess. 52-53 (1976). The ultimate outcome in 1976, however, was to reject such a requirement for OCS leasing. Instead, Congress amended Section 307(c)(3)(B) to create a phased, step-by-step consistency regime for OCS exploration, development, and production activities. Congress expressly concluded that application of CZMA consistency re-

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[5] The House bill would have required consistency for all federal activities on federal lands within the coastal zone, while the Senate bill would have exempted such activities from CZMA requirements. See 82-1326 Pet. Br. 23.

[6] We concede that, so long as a federal activity "directly affects" the coastal zone, the plain language of Section 307(c)(1) does subject federal activities on federal and submerged lands outside the coastal zone to CZMA consistency requirements. There is, however, no express appreciation of this point in the 1972 Conference Report and the State cannot manufacture such an awareness on the part of Congress by the simple expedient of including, in brackets, the term "including OCS lands" each time it discusses the Conference Report (State Br. 11, 12, 26). The bracketed phrase *does not* appear in the report.

quirements to the specific stages in the OCS process "will satisfy state needs for complete information, on a timely basis, about the details of the oil industry's offshore plans." S. Conf. Rep. 94-987, 94th Cong., 2d Sess. 30 (1976); H.R. Rep. 94-1298, 94th Cong., 2d Sess. 30 (1976).

3. Respondents next suggest that Congress in 1976 did not really reject a consistency requirement at the OCS leasing stage. Rather, they submit, Congress must have intended to shift the consistency requirement from the lease applicant under Section 307(c)(3) to the federal government under Section 307(c)(1) (see Humb. Br. 13). There is, of course, no textual evidence supporting such an argument in the 1976 legislative history. Moreover, that argument imputes to Congress a prescience of events that were not to occur for another year.

As we stated in our opening brief, throughout the 1976 legislative proceedings, no one suggested that Section 307(c)(1) applied to OCS lease sales (82-1326 Pet. Br. 33).[7] Instead, Congress debated whether the consistency requirements of Section 307(c)(3) were, or should be, applicable to OCS leasing. In September 1976, two months after the enactment of the CZMA amendments, NOAA issued proposed regulations implementing the consistency requirements of the amended statute. 41 Fed. Reg. 42878. Those proposed regulations did not suggest that an OCS lease sale was a "federal activity" within the meaning of Section 307(c)(1), did not contain an expansive definition of the term "directly affecting the coastal zone," and did not define "federal activity" in a manner that encompassed nonphysical governmental action. See 41 Fed.Reg. 42885 (1976).

All this changed the following year, however, when NOAA issued a new set of proposed regulations. As we explained in our opening brief, the agency in 1977 offered a definition of "directly affecting the coastal zone" that

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[7] Respondent NRDC does not prove otherwise by quoting report language that generally deals with the development of OCS resources (NRDC Br. 37). In fact, NRDC concedes that, in 1976, OCS leasing was thought to be subject to Section 307(c)(3), not Section 307(c)(1) (NRDC Br. 32-33 n.34).

equated "directly" with "significantly" (82-1326 Pet. Br. 35-36 & n.27). The proposed regulations also suggested, for the first time, that the term "federal activities" in Section 307(c)(1) should be defined as a "residual category" that covered all federal functions (including nonphysical actions such as rulemaking) not expressly addressed by other consistency sections of the CZMA. 42 Fed. Reg. 43585, 43597-43598 (1977). Against this definitional background, NOAA stated that it was "considering a position" that would include OCS lease sales as federal activities subject to Section 307(c)(1). 42 Fed. Reg. 43591 (1977). 82-1326 Br. 35-36 & n.28.[8]

Thus, the argument that Congress in 1976 intended to shift consistency obligations at the lease sale stage from potential lessees to the federal government rests upon an assumption that Congress silently anticipated a definitional revolution performed by NOAA a year later. As demonstrated in our opening brief, however (82-1326 Pet. Br. 32), the contemporaneous legislative history shows that Congress rejected imposing a consistency requirement on OCS lease sales because of the inadequate information that is available concerning OCS hydrocarbon resources and the activities that may be necessary for their extraction. This lack of knowledge is shared by the OCS lease applicant, the federal government, and the coastal states at the lease sale stage of the OCS process.[9]

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[8] The language quoted by NRDC (NRDC Br. 38) from the Ad Hoc Select Comm. on the Outer Continental Shelf, 95th Cong., 1st Sess., *A Study of Offshore Oil & Gas Development* 155-157 (Comm. Print 1977), is actually from a NOAA document reprinted in the appendix to that study. It reflects NOAA's position, adopted in 1977, that an OCS lease sale may be considered to be a "federal activity" within the meaning of Section 307(c)(1) because OCS leasing was excluded from Section 307(c)(3). However, the certainty with which that conclusion is expressed in this NOAA document is contradicted by the expressions of uncertainty concerning that legal position in the 1977 and 1978 Federal Register notices. 42 Fed. Reg. 43591; 43 Fed. Reg. 10510, 10523.

[9] Respondents argue that petitioners are relying upon the 1976 CZMA amendments as a "repeal by implication" (State Br. 31; NRDC Br. 32; CSO Br. 25). To the contrary, our argument is that Section 307(c)(1) never did impose consistency requirements based upon future

4. The respondents' treatment of the post-1976 legislative and administrative events is also disingenuous at best. In 1979, for example, the Department of Justice concluded that NOAA had the authority to declare that the Department of the Interior's preleasing activities were federal activities within the meaning of Section 307(c)(1). The Department, however, determined that the agency lacked the authority to dilute Section 307(c)(1)'s threshold test from "directly" to "significantly" (J.A. 45-47).[10] The State professes to accept the portion of the opinion that rejects the "significance" standard (State Br. 21 n.35). But, at the same time, it expressly adopts the list of so-called "direct" effects of OCS Lease Sale No. 53 created by the district court (Pet. App. 62a-65a; State Br. 48). This list was taken wholesale from the environmental impact statement (EIS) on OCS Lease Sale No. 53,[11] which was prepared under a standard of "significanc[e]" (42 U.S.C. 4332(2)(C)) and which addressed the indirect and cumulative effects of the proposed lease sale. See 40 C.F.R. 1508.25(c), 1502.16,

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exploration, development and production activities at the lease sale stage. Respondents' argument, however, may be fairly characterized as "amendment by implication." They claim that because Congress rejected including a consistency requirement on OCS leases when it amended Section 307(c)(3) in 1976, such a consistency requirement must be found in Section 307(c)(1), and the general terms of that provision, unchanged since its adoption in 1972, must now be interpreted to achieve that result, regardless of the original intent of Congress or the plain meaning of the statutory terms.

[10] The state suggests that the Department of Justice found that there were preleasing activities that directly affect the coastal zone for which consistency review at the exploration or development and production stages would come too late (State Br. 40 n.68). The State, however, pointedly omits the first part of the sentence quoted from the Department's opinion ("[I]t is well possible that * * *") (J.A. 43) as well as its conclusion ("[T]he question of whether those activities or any of them directly affect the Coastal Zone is essentially one of fact which the Department of Justice is not authorized to answer") (J.A. 47). There are, throughout the briefs filed by respondents, numerous instances of partial quotation. See also n. 6, *supra* and n.13 *infra*. They are too numerous to answer individually here. We trust that the Court will review all quoted materials in full and in context.

[11] The district court also drew upon the Secretarial Issue Document (SID). See 82-1326 Pet. Br. 11 & n.10.

1508.7 and 1508.8. Respondents simply cannot disclaim an intention to substitute "significantly" for the term "directly" as the threshold term in Section 307(c)(1) and then rely upon the cumulative and indirect effects that may flow from an OCS lease sale to establish that this threshold has been reached (NRDC Br. 47; State Br. 39).[12]

5. Respondents continue to cite language contained in 1980 Senate and House Reports as persuasive evidence of the 1972 congressional intent behind the term "directly affecting the coastal zone." At the same time, they fault the United States for relying on the minority views expressed in the 1981 House Report on the resolution of disapproval (State Br. 24). H.R. Rep. 97-269, 97th Cong., 1st Sess. 16 (1981). As we stated previously (82-1326 Pet. Reply Br. 8-9), the minority views are offered primarily to show that the reports relied upon by respondents and the lower courts cannot be deemed to be reliable expressions of "Congress," but are instead the views of the majority of the members that were sitting on the relevant committees in 1980. The 1980 reports and the 1981 majority views were challenged as inappropriate by members of Congress when they were issued[13] and should not have been accorded sub-

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[12] While most of the lower courts' construction of the CZMA consistency requirements is fairly specific to the OCSLA oil and gas lease sale context, their equation of the effects disclosed in an EIS with direct effects on the coastal zone within the meaning of Section 307(c)(1) may well influence the future construction of other federal statutes. The National Environmental Policy Act of 1969, 42 U.S.C. (& Supp. V) 4321 *et seq.*, of course, is essentially a procedural statute (see *Strykers Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227 (1980); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 538 (1978)), and the regulations governing the preparation of environmental impact statements (40 C.F.R. Pt. 1500 *et seq.*) are designed to fulfill the informative, procedural nature of NEPA duties. If, however, the remote and speculative effects that may be described in an EIS are considered "direct effects" of a federal action for the purpose of applying the substantive limitations of Section 307(c)(1) of the CZMA, the expansive regulations governing NEPA compliance may have to be rethought.

[13] The State and NRDC attempt to paint the challenge to the 1980 House Report on the floor of the House as a reaffirmation rather than a denial of the language contained in the report (State Br. 17 n.29;

stantial weight in the lower courts (Pet. App. 15a). As this Court has previously stated:

> We are normally hesitant to attach much weight to comments made after the passage of legislation * * *. In view of the contradictory nature of these cited statements, we give them no weight at all.

County of Washington v. *Gunther*, 452 U.S. 161, 176 n.16 (1981). This treatment of post-enactment congressional statements is fully appropriate here.

6. Finally, the respondents chide the federal government for a lack of consistency in its position (NRDC Br. 26; State Br. 45). According to the NRDC, the federal government should have resisted application of the Section 307(c)(1) consistency requirements to any federal activity on the OCS. Unlike the respondents, however, the federal petitioners have felt constrained by the "plain meaning" rule of statutory construction in the absence of fairly conclusive contrary legislative history. See *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976). Moreover, the federal respondents have acquiesced in NOAA's interpretation of Section 307(c)(1) as a residual category for all federal functions not expressly subject to the other consistency provisions of the CZMA, and have cooperated with the states by reviewing the preleasing activities associated with each lease sale as well as the activities immediately authorized by the prospective leases to determine whether those activities "directly affect" the coastal zone and, if so, whether they are consistent, to the maximum extent practicable, with an approved coastal zone management program (J.A. 66-72). Therefore, to the extent that the

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NRDC Br. 35 n.37). The challenger on the floor of the House, however, was Representative McCloskey, who in 1981 voted against the resolution of disapproval and signed the statement of dissenting views. H.R. Rep. 97-269, *supra*, at 8, 19. Representative Studds, in response to the challenge, concluded that any question regarding the proper application of the "directly affecting" threshold of Section 307(c)(1) remains "essentially one of fact as the Justice Department has previously concluded." 126 Cong. Rec. H10111-H10112 (daily ed. Sept. 30, 1980). Thus, any reaffirmation contained in this colloquy is of the conclusions contained in the 1979 Department of Justice opinion, not the very different language in the 1980 reports.

phased, step-by-step, consistency regime expressly designed by Congress to apply to the OCS oil and gas process (16 U.S.C. 1456 (c)(3)(B); 43 U.S.C. (Supp. V) 1340(c)(2), 1351(d) and 1351(h)(1)(B)) contained a regulatory gap at the lease sale stage, that gap has been filled. What the federal petitioners refuse to acquiesce in is a post-hoc interpretation of the general statutory language of Section 307(c)(1) that effectively amends the language enacted by Congress in 1972 and that compromises the entire structure of decisionmaking under the 1976 amendments to the CZMA and the 1978 amendments to the OCSLA when such a result does not serve the purposes of the Coastal Zone Management Act in any meaningful way. See 82-1326 Pet. Br. 42-43.

II

Respondents suggest that consistency "review" at the OCS lease sale stage is good "policy" because it will further information sharing and consultation. But as we already detailed (82-1326 Pet. Br. 42), the immediate purpose of Section 307(c)(1) is not to provide coastal states with environmental information or the opportunity to participate in the initial planning stages of federal activities on the outer continental shelf. Those functions are filled by NEPA and the OCSLA not only at the lease sale stage, but even earlier. The CZMA is concerned with substantive results, not procedure. Indeed, with two exceptions, respondents do not even attempt to describe how the substantive limitation of Section 307(c)(1) can be integrated with OCS lease sale decisionmaking (CSO Br. 20; Humb. Br. 36-37). The respondents' reluctance to address this subject is telling because, upon analysis, the claimed benefits of lease sale stage consistency "review" evaporate.

Respondents assert that a consistency determination at the lease sale stage is necessary to permit comprehensive consideration of the cumulative impacts of OCS development (NRDC Br. 47; CSO Br. 16-17). They fail to mention, however, that the environmental impact statements prepared for OCS lease sales already undertake such an analysis, and they likewise ignore the substantive mandate of the CZMA. The CZMA does not require that the federal government "consider" the cumulative impact of its actions

directly affecting the coastal zone; it mandates that those activities be consistent to the maximum extent practicable with an approved coastal management plan. And, as noted earlier, the actual impact of future activities depends, not upon the contours of an individual lease sale, but rather upon whether commercial quantities of oil or gas are found, the type, quantity and location of the discoveries, and the technology available for their extraction. See 82-1326 Pet. Br. 28. Because even respondents concede that the actual impacts of later stage activities cannot be determined at the lease sale stage (State Br. 40-41), application of Section 307(c)(1) to an OCS lease sale "will almost inevitably result in an erroneous [consistency] decision" (82-1326 Pet. Br. 45-46).[14]

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[14] Congress mandated a phased system of decisionmaking for the OCS oil and gas process in the 1976 amendments to the CZMA and the 1978 amendments to the OCSLA to avoid the necessity of making premature decisions at the lease sale stage when "onshore and environmental impacts of production activit[ies]" are not yet known. H.R. Rep. 95-590, 95th Cong., 1st Sess. 164 (1977). This approach had wide ranging support—including that of the National Governors Council and various environmental groups. See *Outer Continental Shelf Lands Act Amendments and Coastal Zone Management Act Amendments: Joint Hearings on S. Res. 45 and S. Res. 222 Before the Senate Comm. on Interior and Insular Affairs and Commerce*, 94th Cong., 1st Sess. 3 (1975) (hereinafter cited as *Joint Hearings*). See also *Outer Continental Shelf Lands Act Amendments of 1977: Hearings on S. 9 Before the Senate Comm. on Energy and Natural Resources*, 95th Cong., 1st Sess. 71, 500-501, 584 (1977). Indeed, the near universal understanding at the time that the 1976 amendments to the CZMA and the 1978 amendments to the OCSLA were formulated was that the coastal impacts of the exploration, development and production stages of the OCS process could not be determined at the lease sale stage. This widespread understanding is illustrated by the following testimony before the Senate Committee on Interior and Insular Affairs in 1975 (*Joint Hearings* 1131):

> ***Senator Johnston:***
>
> **With respect to dismemberment of the decisions to explore and produce, * * *. What would be the reason why you would not produce, once you had explored.**
>
> ***Ms. Heller [Environmental Policy Center]:***
>
> **It seems to me there could be several. One is you could find, after exploration, that it is not worth it to develop the resource. That it is not a commercial find.**

Nor is it necessary to impose a consistency limitation at the lease sale stage to avoid eventual violation of a state coastal management program. Under the relevant provisions of the CZMA, 16 U.S.C. 1456(c)(3)(B), and the OCSLA, 43 U.S.C. (Supp. V) 1340(c)(2) and 1351(d), the states have the right to review and either approve or disapprove any exploration, development or production activities on the OCS before they occur. If the effects of any such activity, either alone or in conjunction with the impacts of other activities, violate a state management plan, the state has the right to disapprove the proposed activity. Therefore, while the individual lessees may not have the right to control each other's activities (CSO Br. 17), the state and federal governments unquestionably retain the right to review and control each lessee's activities in the context of all preexisting activities on the OCS.

In these circumstances, it is difficult to conceive a meaningful role for an inherently inaccurate and speculative consistency determination at the lease sale stage of the OCS oil and gas process. To the extent that a state desires information concerning the potential cumulative impacts of an OCS lease sale, that information is provided in the environmental impact statement prepared pursuant to NEPA. A consistency determination at the lease sale stage, moreover, will not obviate the necessity of studying the activities detailed in subsequent exploration, development and production plans to determine whether the incremental effects of the planned activities will result in the violation of a state coastal zone management program. The respondents, therefore, are reduced to suggesting that OCS lease sale consistency "review" would be beneficial in drafting lease

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There are other reasons, also. A State could say—could decide that the impacts were going to be much more than they could bear.

Senator Johnston:

Couldn't you make that decision in advance of exploration?

Ms. Heller:

I don't see how you can. How could you know what the impacts are going to be until you know what the extent of the resource is? The onshore impacts depend, to a great extent, on how much oil is actually out there.

stipulations and promoting intergovernmental coordination. The first proposition is entitled to little weight and the second ignores Congress' careful consideration of federal-state relations in drafting the OCSLA.

Respondents submit that an OCS lease sale consistency determination would permit the drafting of lease stipulations to insure consistency with state management programs (Humb. Br. 29; CSO Br. 16-17). But, because lease stipulations are contract terms, they cannot be changed at the will of the government. Unlike other administrative tools, such as regulations, operating orders and plan approval criteria, which can be modified unilaterally by the federal government as the OCS process unfolds (see 43 U.S.C. (Supp. V) 1334(a)), lease stipulations can be modified only by agreement of both parties. As a result, lease stipulations addressing exploration, development and production stage activities may restrict rather than expand the options available to the government at these stages of the OCS process, and should be included in an OCS lease only when the parties are confident that, under any eventuality, the terms of the stipulation will provide the appropriate standard.[15] Because of the uncertainty concerning future events at the time of lease sale, inclusion of specific stipulations to insure "consistency" could in fact thwart its attainment.[16]

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[15] The Secretary, for example, is charged with the duty to require lessees to use the "best available and safest technologies" ("BAST"). 43 U.S.C. (Supp. V) 1347(b). A stipulation specifying the use of certain equipment on an OCS lease (see Humb. Br. 32), therefore, could become inconsistent with the Secretary's BAST duties if available technology advances between the lease sale and development stages. See *Conservation Law Foundation* v. *Andrus*, 623 F.2d 712, 719 (1st Cir. 1979) ("the statutory scheme providing for retroactive application of BAST regulations indicates that the Secretary's duty to develop the regulations is an ongoing process which allows for flexible, changing standards as the available technology evolves").

[16] An excellent example of this point arose in connection with OCS Sale No. 68 off southern California in 1981. The California coastal zone management program calls for subsea (*i.e.* underwater) completions of production wells in some areas to protect the aesthetic "viewscape," unless other types of completion are environmentally preferable.

The respondents' most prominent assertion is that a consistency determination affords an opportunity for federal-state cooperation and coordination. Indeed, the State of Alaska asserts that the consistency determinations prepared to date for sales off its coast have obviated litigation by providing an opportunity for consultation and agreement (Alaska Br. 10). Admittedly, the State of Alaska has not sought to enjoin recent lease sales[17] and the Secretary and the Governor of Alaska have been able to work out their disagreements. But this felicitous result cannot be attributed to the preparation of consistency determinations, because Section 19 of the OCSLA, 43 U.S.C. (Supp. V) 1345—not Section 307(c)(1) of the CZMA—provided the procedures and authority utilized by the Secretary.[18]

Section 19 of the OCSLA, entitled "Coordination and consultation with affected State and local governments," grants the Governor of any affected state the formal opportunity to submit recommendations regarding the "size, tim-

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Cal. Pub. Res. Code § 30262(c) (West 1977). For Lease Sale No. 68, California requested that stipulations requiring subsea completions be placed into the leases on certain tracts, on the theory that this stipulation would make the sale of the tracts consistent with its management plan. Ironically, such a stipulation could render development of the leased tracts inconsistent in the future. Depending upon the resources found and technology then available (four to five years in the future), another completion method may be environmentally preferable. To avoid this contingency, the stipulation would have to have been drafted so that the government reserved the right to require, but did not mandate, subsea completions. Although such a stipulation could be drafted, those same rights are already reserved, without a stipulation (and without the risk of error inherent in a stipulation), by the very terms of the OCSLA and the CZMA. 43 U.S.C. (Supp. V) 1334(a), 1340(c), 1347(b) and 1351(h); 16 U.S.C. 1456(c)(3)(B).

[17] The local governments sue in Alaska, not the state. See *North Slope Borough* v. *Andrus*, 642 F.2d 589 (D.C. Cir. 1980); *North Slope Borough* v. *Watt*, No. A82-421 (D. Alaska); *Association of Village Council Presidents* v. *Watt*, No. A83-150 (D. Alaska); *Village of Gambell* v. *Watt*, No. N83-003 (D. Alaska), appeal pending, . Nos. 83-3735, et al. (9th Cir.); *Village of False Pass* v. *Watt*, 565 F. Supp. 1123 (D. Alaska 1983), appeal pending, No. 83-3989 (9th Cir.)

[18] As the State itself declared in its brief (Alaska Br. 9), Alaska ceased suing to enjoin OCS lease sales long before the first consistency determination under Section 307(c)(1) was prepared.

ing or location" of an OCS lease sale. 43 U.S.C. (Supp. V) 1345(a). See 82-1326 Pet. Br. 6. In considering whether to accept these recommendations, the Secretary is required to provide the state with an "opportunity for consultation," (43 U.S.C. (Supp. V) 1345(c)), and is expressly authorized "to enter into cooperative agreements with affected States" for purposes consistent with the OCSLA (43 U.S.C. (Supp. V) 1345(e)). The cooperative agreements forged between the Secretary and the Governor of Alaska, therefore, did not flow from the consistency provisions of the CZMA but rather from the explicit statutory terms of the OCSLA.

Indeed, as the record in this case demonstrates (see 82-1326 Pet. Br. 9-14, 42 & n.34), Section 19 of the OCSLA provides the states with every accommodation—short of control or a veto power over OCS leasing—that they claim is necessary to protect their long-term coastal management interests. A governor's recommendation that incorporates, or is based upon, possible consistency concerns during the later stages of the OCS process must be considered by the Secretary and accepted if he determines that the recommendation provides a reasonable balance between the national interest and the well-being of the citizens of the state. 43 U.S.C. (Supp. V) 1345(c).[19] Accordingly, to the extent that the states merely desire input and federal-state coordination regarding particular OCS lease sales, Section 19 provides the appropriate mechanism, and a lease sale consistency determination is plainly unnecessary. See Humb. Br. 38; State Br. 37 (discussing Secretary Andrus' accommodation of state concerns during OCS Lease Sale No. 48).

In the end, respondents rest upon the simple postulate that, because OCS lease sale decisions are of potential significance for the coastal zone, there must be a substantive

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[19] The considerations that may be raised in a governor's Section 19 recommendation extend beyond, but of course include, coastal zone management concerns. In practice, the governor's recommendations usually includes the position adopted by the state coastal zone management authorities. See, *e.g.*, *Conservation Law Foundation* v. *Watt*, 560 F. Supp. 561, 576, 579 (D. Mass. 1983), aff'd on other grounds, Nos. 83-1258, et al. (1st Cir. Sept. 16, 1983). See also J.A. 73-95.

CZMA limitation that can be imposed upon such decisions. But, the attempt to impose a substantive consistency limitation on OCS lease sales that is both meaningful and possible founders upon reality. Lease sale stage tract selection decisions, as respondents own descriptions show, are essentially informed judgment calls. See, *e.g.*, Humb. Br. 32-34. Some parties before this Court have nevertheless suggested that the Secretary should be required to determine, prior to issuing an OCS lease, that consistency at future stages of the OCS process is possible or at least is not precluded.[20] While respondents are certainly correct that the federal government is capable of producing such a determination at the lease sale stage, they err in concluding that such a document would be meaningful (CSO Br. 20). In fact, in *Conservation Law Foundation* v. *Watt*, 560 F. Supp. 561, 578 (D. Mass. 1983), aff'd on other grounds, Nos. 83-1258, et al. (1st Cir. Sept. 16, 1983), the district court, at the behest of one of the amici in this case, ruled that a consistency determination prepared under a similar standard was insufficient precisely because it failed to assure, in a meaningful way, that future exploration and development activities would indeed be consistent with the state's coastal zone management plan.[21]

As demonstrated by the cited case, a conclusion that future consistency is "possible" is not a meaningful substantive consistency determination. Conversely, because of the lack of information at the OCS lease sale stage, a truly meaningful consistency limitation cannot be imposed without compromising the phased system of OCS decisionmaking. Congress recognized these realities in 1972, 1976

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[20] CSO and County of Humboldt (CSO Br. 20; Humb. Br. 36-37). The remaining respondents and amici curiae remain silent as to an appropriate standard of consistency at the lease sale stage of the OCS process. They limit their remarks to a disclaimer of a "veto power" over OCS leasing. Even this concession, however, is coupled with an assertion that it is not a "state" veto because their coastal zone management program was approved by the Secretary of Commerce (State Br. 44). The federal government, however, never approved the 12-mile buffer zone California sought to impose in this case (J.A. 74).

[21] One of the signers of the CSO brief was the Attorney General of Massachusetts. We are unable to reconcile that state's position in *Conservation Law Foundation* v. *Watt*, *supra*, with the content of the CSO submission to this Court.

and 1978; we merely ask that its resolution of this conflict be confirmed.

For these reasons, and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

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